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ABSTRACT

Sexual harassment is deemed a violation of the Canadian Charter of Rights and Freedoms which provides protection from discrimination based on sex. Provincial jurisdictions may offer legislation more stringent than that reflected in the Canadian code. Recourse for acts of sexual harassment through the courts is sought by alleging discrimination. The judicial system's legal definition of sexual harassment addresses both the direct harassment between the harasser and the harassed and the indirect harassment that creates the offensive, sexist environment detrimental to comfort and productivity. Sport, for a number of historical, cultural, and social reasons, has generally been dissociated from the issue of sexual harassment. In November 1993, the Canadian Broadcasting Corporation put a crack in the wall of protection with their investigation of sexual harassment in athletics and the airing of their documentary "Crossing the Line." Legal complaints are expected to become more frequent as a result, and most sport organizations prefer prevention and early resolution rather than court proceedings. Prevention efforts involve the development of organizational policy, education, and communication of a zero tolerance. An appendix offers a summary of Canadian law as it relates to sexual harassment. (Contains 11 references.) (JDD)

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Sexual Harassment and Sexual Assault In Canadian Sports and Courts

Presented by
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Eighth Annual Sport, Physical Education, Recreation and Law Conference
Jekyll Island, Georgia
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Introduction to Canadian Law

Sexual harassment has recently been acknowledged as a critical social issue. However, one ongoing dilemma with prosecuting sexual harassment has been defining its parameters. The justice system has provided a resource from which many definitions have evolved. Under Canadian law, sexual harassment is a form of sex discrimination, punishable by law. The significance of such a position is that behaviours less serious than the most aggressive previously prosecuted under the law such as sexual assault, are now recognized as debilitating to women and precluded their equal treatment in the workforce. Collier and Holmes (1989) note that sexual harassment, as a derivative of discrimination, "is discriminatory when it makes submitting to sexual favors a condition of employment or advancement or when it creates an offensive working environment" (p. 28). This is viewed as a logical extension to anti-discrimination law since it would be superfluous to facilitate women's entry into the workforce while condoning an environment that neutralized their ability to perform because of sexual hostility (Kors, 1992).

Sexual harassment is one of many forms of harassment that can interfere with equal treatment of individuals based upon difference, differences legally identified as race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability, or conviction for an offence for which a pardon has been granted (MacKillop, 1993). The Canadian Charter of

Rights and Freedoms (1982) provides protection from discrimination based on sex as do Provincial jurisdictions. Sexual harassment is deemed a violation under this legislation. Of significance is the clause related to equality which states that:

a. Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(Government of Canada, 1982).

Recourse for acts of sexual harassment through the courts is sought by alleging discrimination. The purpose of the legislation is to stress an individual's right to equality of opportunity (MacKillop, 1993).

The Canada Labour Code, which applies only to federally-regulated employers, mirrors efforts to address sexual harassment more specifically. It defines harassment as:

any conduct, comment, gesture or contact of a sexual nature

- (a) that is likely to cause offence or humiliation to any employee; or
- (b) that might, on reasonable grounds, be perceived by that employee as placing a condition of a sexual nature on employment or on any opportunity of training or promotion.

A 1989 case heard before the Supreme Court of Canada, Janzen v. Platy Enterprises Ltd. may have significance for the sport environment. It was held that for behaviour to constitute sexual harassment:

- the conduct did not have to be explicit
- the conduct did not have to occur within a superior-subordinate relationship; and

- there did not have to be tangible economic or job-related benefits or punishments at stake.

(Corbett, 1994)

Coupled with this is the 1992 amendment to the Criminal Code of Canada that determines when consent cannot be obtained. Referred to as 'sexual exploitation', a person in a position of trust or authority cannot use consent as a defense for an offense against a person between 14 and 18 years of age.

Further, Provincial jurisdictions may offer legislation more stringent than that reflected in the Canadian code. For example, Ontario's Human Rights Code defines harassment as "engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome" (MacKillop, 1993). The Ontario Code also sets out three offences relating specifically to sexual harassment:

- 7(2) Every person who is an employee has a right to freedom from harassment in the workplace because of sex by his or her employer or agent of the employer or by another employee.
- (3) Every person has a right to be free from,
 - (a) a sexual solicitation or advance made by a person in a position to confer, grant or deny a benefit or advancement to the person where the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome, or
 - (b) a reprisal or threat of reprisal for the rejection of a sexual solicitation or advance where the reprisal is made or threatened by a person in a position to confer, grant or deny a benefit or advancement to the person.

(MacKillop, 1993)

Catharine MacKinnon (1979, 1987) has been a leader on both sides of the border in promoting the interpretation of sexual harassment as a form of discrimination based upon sex. As a result, the judicial system identifies two components of a legal definition of sexual harassment. These are identified as

a) the legally phrased 'quid pro quo' segment which involves those cases clearly defined through the exchange of a reward or threat of reprisal in return for sexual favour and b) hostile work environment which recognizes job interference on the premise that inappropriate behaviours and attitudes obstruct achievement of organizational goals and the ability to perform to potential. This approach, supported by others (Blanchette, 1989; MacKillop, 1993) addresses both the direct harassment between the harasser and the harassed and the indirect harassment that creates the offensive, sexist environment detrimental to comfort and productivity. Both are evident in sport and need to be addressed. Sexual harassment is a violation of the law, an illegal manifestation of sex discrimination.

Sport, for a number of historical, cultural and social reasons, has generally been dissociated from the last twenty plus years of public confrontation with the issue of sexual harassment. In November, 1993, the Canadian Broadcasting Corporation put a crack in the wall of protection with their investigation of sexual harassment in athletics and airing of their documentary "Crossing the Line". We would like to show you some edited copy of this program which at last exposes a problem that has been silenced for years.

Documentation of Sexual Harassment in Sport

13 minutes of video - edited clip of CBC's 5th Estate "Crossing the Line"

Summary of Current Response

The legislation cited earlier can be applied to sport, not only in employment situations, but also in many volunteer situations where relationships involving athletes are now accorded stronger protections. The

case of 50 year old George William Smith entered the courts in November, 1993. An Edmonton running team coach and former junior high school teacher was charged with three counts of sexual assault and two counts of indecent assault between 1982 and 1987 perpetrated against four teenage team members. The coach was found guilty of the charges and sentenced to 2& 1/2 years for the behaviours.

Many suggest that this case is a break through. The Smith charges and decision are unusual, a rare example of athletic abuses that reached the courts. Similar cases are waiting in the wings. One example of this is the current outstanding charges against the National Cycling Coach.

Although an option, a legal complaint is expensive financially and personally and it is difficult to know if a complaint of sexual harassment will be adjudicated within the legislation prohibiting discrimination (Backhouse & Cohen, 1978). However, legislation has proved worthwhile as a guide for the development of organizational sexual harassment policy and procedures. Prevention and early resolution are the preference of most sport organizations, now that silence appears to be losing its effectiveness. One of the outcomes of the 5th Estates' Program of "Crossing the Line" has , in fact, been the development of organizational policy. Some examples:

- Harassment In Sport: A guide to Policies, Procedures and Resources

This document was produced as a cooperative amongst the Canadian Association for the Advancement of Women and Sport and Physical Activity, the Canadian Athletes' Association, the Canadian Interuniversity Athletic Union, the Canadian Professional Coaches Association, the Canadian Sport Council, the Coaching Association of Canada, Sport Canada, and Volleyball Canada. It is a guide for organizations committed to policy development.

- Harassment Policy and Resource Book for NSO's

Draft #4 was produced in June, 1994.

- The formation of an Ontario coalition that mirrors the National group with a mandate to develop a harassment policy for PSO's in Ontario as well as educational athletic bodies (Ontario Women's Interuniversity Athletic Association, (OUAA?), Ontario College Athletic Association, Ontario Federation of School Athletic Associations) and recreation (Ontario Sports and Recreation Centre, Parks and Recreation Federation of Ontario).

- Many organizations such as the Professional Coaches Association and Volleyball Canada have incorporated sanction statements on sexual harassment in a Code of Ethics. Volleyball Canada has put an ombudsperson in place at the National Team Training Centre in Winnipeg, Manitoba.

Education and communication of a zero tolerance are also essential. Perpetrators count on their targets failing to press charges and on the system to protect them. Dr. Sandra Kirby currently has a research grant to study high performance athletes and work with them to assist in the identification of sexually harassing behaviours and in confronting the behaviours early and in a safe way. Her focus is on experiences during travel for competition, one of the most vulnerable times for the athlete. While much remains to be done, the wheels are now in motion and there is no turning back.

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Summary of Canadian Law As It Relates To Sexual Harassment

Government of Canada, 1982

- a. Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Canada Labour Code (applies only to federally-regulated employers)

any conduct, comment, gesture or contact of a sexual nature

- (a) that is likely to cause offence or humiliation to any employee; or
- (b) that might, on reasonable grounds, be perceived by that employee as placing a condition of a sexual nature on employment or on any opportunity of training or promotion.

Provincial jurisdiction, for example, Ontario's Human Rights Code

Defines harassment as engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome.
In the Ontario Code

- 7(2) Every person who is an employee has a right to freedom from harassment in the workplace because of sex by his or her employer or agent of the employer or by another employee.
- (3) Every person has a right to be free from.
 - (a) a sexual solicitation or advance made by a person in a position to confer, grant or deny a benefit or advancement to the person where the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome, or
 - (b) a reprisal or threat of reprisal for the rejection of a sexual solicitation or advance where the reprisal is made or threatened by a person in a position to confer, grant or deny a benefit or advancement to the person.

Evolution of the Law

- Before 1983: Consent for having sex could not be obtained if the complainant was under 14 years of age.
- 1983: Consent for having sex could not be obtained if the complainant was under 14 years of age or if the accused exercised a position of authority to obtain compliance.
- 1985: Sexual exploitation - a person in a position of trust or authority having sex with someone between the ages of 14 and 18 - became a crime.
- 1992: There can be no consent if the accused abuses a position of trust or authority to obtain compliance.